A **MALAYSIAN ASSURANCE ALLIANCE BHD**

v.

ANTHONY KULANTHAI MARIE JOSEPH

B FEDERAL COURT, PUTRAJAYA
ARIFIN ZAKARIA CJ (MALAYA)
ZULKEFLI MAKINUDIN FCJ
MOHD GHAZALI YUSOFF FCJ
[CIVIL APPEAL NO: 02(f)-21-2009 (W)]
C 22 MARCH 2010

INSURANCE: *Life insurance - Whether insurers are trustees of sums secured by policy - Life policy taken by deceased for benefit of wife - Action by wife to recover sum secured by policy - Whether action founded on*
D *contract or on trust - Whether insurer declared itself trustee of policy - Whether action time-barred - Civil Law Act 1956, s. 23(1) - Limitation Act 1953, ss. 6 & 22(1)(b)*

LIMITATION: *Insurance policy - Whether insurers are trustees of sums*
E *secured by policy - Life policy taken by deceased for benefit of wife - Action by wife to recover sum secured by policy - Whether action founded on contract or on trust - Whether insurer declared itself trustee of policy - Whether action time-barred - Civil Law Act 1956, s. 23(1) - Limitation Act 1953, ss. 6 & 22(1)(b)*

F ***TRUST:*** *Trusts - Life insurance policy - Whether insurers are trustees of sums secured by policy - Life policy taken by deceased for benefit of wife - Action by wife to recover sum secured by policy - Whether action founded on contract or on trust - Whether insurer declared itself trustee of policy - Whether action time-barred - Civil Law Act 1956, s. 23(1) - Limitation*
G *Act 1953, ss. 6 & 22(1)(b)*

On 12 June 1992 the deceased took out a life insurance policy with the appellant. The policy was for the benefit of his wife, the respondent. He passed away on 2 March 1993. The respondent's
H claim under the policy was rejected by the appellant. On 16 July 2004, *ie*, more than 11 years after the death of the deceased, this claim was filed by the respondent. The appellant resisted the claim on the grounds that the claim was time barred under of s. 6(1) the Limitation Act 1953 ('LA'). The High Court found in favour of the
I appellant and dismissed the claim. The Court of Appeal in allowing the respondent's appeal held that in the absence of the handing

over of the trust property to appointed trustee(s) pursuant to s. 23 Civil Law Act 1956 ('CLA'), the trust property (the sum secured by the policy) remained in the hands of the Appellant as bare trustee from the date of the death of the deceased. According to the Court of Appeal, the appellant having declared that it will pay the insurance money directly to the beneficiary upon the demise of the deceased, the appellant must be declared to have been appointed as trustee consistent with s. 23(2) CLA. The Court of Appeal further held that it would be inequitable, unconscionable and a gross injustice to allow the appellant to extinguish the right of the *cestui que trust* by invoking the purported limitation, when none existed. Leave to appeal to the Federal Court was granted to the appellant on the following questions: (i) Whether a policy of life insurance effected by an insured on his own life and expressed to be for the benefit of his wife, pursuant to s. 23(1) of the CLA, will upon the death of the insured constitute the insurer as a bare trustee from the date of death of the insured, and therefore any action brought by the beneficiary against the insurer to recover the proceeds of the insurance policy will fall within the provisions of s. 22(1)(b) of the LA; (ii) Whether a declaration by an insurer in a policy of life insurance effected pursuant to s. 23(1) of the CLA that they will pay the proceeds of the policy upon the death of the insured will amount to the insurer being constituted as an express trustee or in the alternative a constructive trustee over the proceeds of the policy; and (iii) Whether a claim by the beneficiary on the policy containing a declaration by the insurer that they will pay the proceeds of the policy upon the death of the insured, will constitute a claim on a contract and is therefore barred by limitation pursuant to s. 6(1)(a) of the LA.

Held (allowing the appeal with costs)
Per Arifin Zakaria CJ (Malaya) delivering the majority judgment of the court:

(1) By s. 23(1) CLA a statutory trust is created in favour of the objects named in the policy and the moneys payable under the policy shall not so long as any object of the trust remains unperformed become part of the estate of the insured or be subject to the debt of the insured. To achieve this purpose the insured may under s. 23(3) CLA appoint a trustee or trustees in respect of the moneys payable. Section 23(4) CLA provides that in default of such appointment the policy shall immediately vest in the insured and his or her personal representatives in trust for the purpose stated earlier. (para 9)

(2) Since the insured did not appoint any person as trustee under s. 23(3) CLA, therefore, under s. 23(4) CLA the policy vested in the insured and upon his death in his legal personal representatives, *ie*, the respondent. This created a statutory trust in which the moneys payable under the policy was to be held in trust by the insured or on his death by his personal representatives as trustee for the named beneficiary. Therefore, the relationship of trust was one between the insured or his legal personal representatives and the beneficiary. (para 11)

(3) The appellant was merely the provider of the insurance policy under a contract of insurance between the appellant and the insured. Therefore, any obligation of the appellant under the policy was strictly contractual in nature. The ownership of the policy will pass to the personal representatives of the insured on his death, who steps into the shoes of the insured and takes over the right of the insured. The right of personal representatives, in the circumstances, is purely a right in contract and not a right under a trust. (para 11)

(4) Based on the provision in s. 166 of the Insurance Act 1996 (Act 553), an insurer is not deemed a trustee of the policy moneys. Thus, the appellant's failure to pay the policy moneys over to the appointed trustee amounted to a breach of its contractual obligation to the deceased or his nominee. (para 18)

(5) The declaration contained in the document forming part of the insurance policy could not be construed as an instrument appointing the appellant as the trustee of the policy. All it said was that the appellant undertook to pay upon the surrender of the policy and subject to its provision, the face amount to the owner if he was still alive at the maturity date, or upon his death prior to the maturity date, to pay the face amount to the beneficiary. This was nothing more than a contractual undertaking under the policy and did not have the effect of making the appellant the trustee of the policy. (para 21)

Per Mohd Ghazali Yusoff FCJ (dissenting):

(1) Section 23 CLA creates a trust in favour of the named beneficiary. Thus, the said policy created a trust in favour of the beneficiary. It was a statutory trust. As long as it remained unperformed, the trust cannot be defeated. The defendant was required pursuant to s. 23 CLA to hand over the monies to the legal personal representative in default of an appointment of a

trustee but up to date the monies remained in its hands. The plaintiff as administratrix was claiming under the trust the trust property which was in the possession of the defendant with knowledge that it was trust property. (paras 41 & 44-45)

(2) Although the relationship between the insured and the insurer could have been one founded on contract during the former's lifetime, upon his death however, the monies in the hands of the insurer became impressed with a trust. That trust was a statutory trust as between the personal representative of the deceased's estate and the ultimate beneficiary. However, *vis-a-vis* the insurer and the ultimate beneficiary, the insurer's express knowledge that the monies in its hand were trust monies rendered it a constructive trustee. Thus, the claim here was proprietary in nature and not based on mere contract. The relevant limitation period was not that prescribed in s. 6(1)(a) LA. (para 50

Bahasa Malaysia *Translation Of Headnotes*

Pada 12 Jun 1992 si mati telah mengambil satu polisi insurans dengan perayu. Polisi itu adalah bertujuan memanfaatkan isterinya, iaitu responden. Beliau meninggal dunia pada 2 Mac 1993. Tuntutan responden di bawah polisi itu telah ditolak oleh perayu. Pada 16 Julai 2004, iaitu, lebih dari 11 tahun selepas kematian si mati, tuntutan ini difailkan oleh responden. Perayu enggan menerima tuntutan itu atas alasan bahawa tuntutan itu adalah dihadkan oleh masa di bawah s. 6(1) Akta Had Masa 1953 ('AHM'). Mahkamah Tinggi membuat keputusan yang berpihak dengan perayu dan menolak tuntutan itu. Mahkamah Rayuan apabila membenarkan rayuan responden mendapati disebabkan ketiadaan penyerahan hartanah amanah kepada pemegang amanah yang dilantik menurut s. 23 Akta Undang-Undang Sivil 1956 ('AUS'), hartanah amanah (jumlah yang dijaminkan oleh polisi) kekal di dalam tangan perayu sebagai pemegang amanah sahaja dari tarikh kematian si mati. Menurut Mahkamah Rayuan, perayu setelah mengisytiharkan bahawa ia akan membayar wang insurans secara terus kepada benefisiari selepas si mati meninggal dunia, perayu mesti diisytiharkan telahpun dilantik sebagai pemegang amanah selaras dengan s. 23(2) AUS. Mahkamah Rayuan lagi memutuskan bahawa ia tidak berekuiti, tidak berhati perut dan suatu ketidakadilan serius untuk membenarkan perayu membatalkan hak *cestui que trust* dengan menggunakan had masa yang dikatakan, apabila tiada wujudnya. Kebenaran untuk merayu ke Mahkamah

A Persekutuan telah diberikan kepada perayu atas soalan-soalan berikut: (i) Sama ada suatu polisi insurans nyawa yang dilaksanakan oleh pengambil insurans atas nyawanya sendiri dan dinyatakan untuk manfaat isterinya, mengikut s. 23(1) AUS, akan selepas kematian pengambil insurans menjadikan penanggung insurans sebagai
B pemegang amanah sahaja dari tarikh kematian pengambil insurans, dan oleh itu apa-apa tindakan yang dibawa oleh benefisiari terhadap penanggung insurans untuk mendapat balik hasil polisi insurans akan termasuk dalam peruntukan s. 22(1)(b) AHM; (ii) Sama ada suatu deklarasi oleh penanggung insurans dalam satu polisi insurans
C nyawa yang dilaksanakan menurut s. 23(1) AUS bahawa mereka akan membayar hasil polisi selepas kematian pengambil insurans akan berjumlah kepada penanggung insurans menjadi pemegang amanah nyata atau secara alternatif pemegang amanah konstruktif ke atas hasil polisi; dan (iii) Sama ada tuntutan oleh benefisiari di
D atas polisi yang mengandungi suatu deklarasi oleh penanggung insurans bahawa mereka akan membayar hasil polisi selepas kematian pengambil insurans, menjadi suatu tuntutan atas kontrak dan oleh yang demikian adalah dihadkan oleh had masa menurut s. 6(1)(a) AHM.

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Diputuskan (membenarkan rayuan dengan kos)
Oleh Arifin Zakaria HB (Malaya) menyampaikan penghakiman majoriti mahkamah:

F **(1)** Melalui s. 23(1) AUS suatu amanah statutori diwujudkan dalam nama objek yang dinamakan di dalam polisi dan wang yang perlu dibayar di bawah polisi tidak akan selama apa-apa objek amanah tersebut tidak dilaksanakan menjadi sebahagian estet pembeli insurans atau tertakluk kepada hutang pembeli insurans.
G Untuk mencapai tujuan ini pembeli insurans boleh di bawah s. 23(3) AUS melantik pemegang amanah berhubungan dengan wang yang perlu dibayar. Seksyen 23(4) AUS menyediakan bahawa disebabkan pelantikan sebegitu polisi akan terletakhak segera dengan pembeli insurans dan wakil persendiriannya dalam
H amanah bagi tujuan yang dinyatakan tadi.

(2) Oleh kerana pembeli insurans tidak melantik sesiapa sebagai pemegang amanah di bawah s. 23(2) AUS, oleh itu, di bawah s. 23(4) AUS polisi yang terletakhak dalam pembeli insurans dan selepas kematiannya dalam wakil persendiriannya, iaitu,
I responden. Ini mewujudkan amanah statutori dalam mana wang yang perlu dibayar di bawah polisi akan dipegang dalam amanah

oleh pembeli insurans atau selepas kematiannya oleh wakil persendiriannya sebagai pemegang amanah untuk benefisiari yang dinamakan. Oleh yang demikian, perhubungan amanah adalah sesuatu di antara pembeli insurans atau wakil persendiriannya dan benefisiari.

(3) Perayu hanya merupakan penyedia polisi insurans di bawah satu kontrak insurans di antara perayu dan pembeli insurans. Oleh itu, apa-apa kewajipan perayu di bawah polisi adalah betul-betul bersifat kontraktual. Hakmilik polisi akan diserahkan kepada wakil persendirian pembeli insurans selepas kematiannya, yang akan menggantikan pembeli insurans dan mengambil alih hak pembeli insurans. Hak wakil persendirian, dalam keadaan-keadaan, merupakan hanya suatu hak dalam kontrak dan bukan suatu hak di bawah amanah.

(4) Berdasarkan peruntukan dalam s. 166 Akta Insurans 1996 (Akta 553), penanggung insurans tidak dianggap sebagai pemegang amanah wang polisi. Oleh itu, kegagalan perayu untuk membayar wang polisi kepada pemegang amanah yang dilantik merupakan satu pelanggaran kewajipan kontraktualnya kepada si mati atau penamanya.

(5) Perisytiharan yang dikandungi dalam dokumen yang membentuk sebahagian dari polisi insurans tidak boleh ditafsirkan sebagai sesuatu instrumen yang melantik perayu sebagai pemegang amanah polisi itu. Ia hanya mengatakan bahawa perayu membuat akujanji untuk membayar atas penyerahan polisi dan tertakluk kepada peruntukannya, amaun muka kepada pemilik jika beliau masih lagi hidup pada tarikh kematangan, atau atas kematiannya sebelum tarikh kematangan, untuk membayar amaun muka kepada benefisiari. Ini hanyalah suatu akujanji kontraktual di bawah polisi dan tidak mempunyai kesan menjadikan perayu pemegang amanah polisi.

Oleh Mohd Ghazali Yusoff HMP (menentang):

(1) Seksyen 23 AUS mewujudkan suatu amanah dalam nama benefisiari. Oleh yang demikian, polisi tersebut mewujudkan suatu amanah dalam nama benefisiari. Ia adalah suatu amanah statutori. Asalkan ia tidak dilaksanakan, amanah itu tidak boleh digagalkan. Defendan diperlukan menurut s. 23 AUS untuk memberikan wang kepada wakil persendirian yang sah jika gagal melantik seseorang pemegang amanah tetapi hingga sekarang

wang itu berada dalam tangannya. Plaintif sebagai pentadbir menuntut di bawah amanah hartanah amanah yang berada dalam milikan defendan dengan pengetahuan bahawa ia adalah hartanah amanah.

(2) Walaupun perhubungan di antara pembeli insurans dan penanggung insurans mungkin merupakan perhubungan yang berdasarkan kontrak semasa jangka hayat pembeli insurans, atas kematiannya walau bagaimanapun, wang dalam tangan penanggung insurans tertera dengan suatu amanah. Amanah itu adalah sesuatu amanah statutori seperti yang di antara wakil persendirian estet si mati dan benefisiari mutakhir. Walaupun begitu, berbanding dengan penanggung insurans dan benefisiari mutakhir, pengetahuan nyata penanggung insurans bahawa wang dalam tangannya adalah wang amanah menjadikannya pemegang amanah konstruktif. Oleh yang demikian, tuntutan di sini merupakan bersifat ketuanpunyaan dan tidak berdasarkan kontrak sahaja. Jangka had masa yang relevan bukan seperti yang dinyatakan dalam s. 6(1)(a) AHM.

Case(s) referred to:

Freemont Development Company Limited v. Travellers Indemnity Company & Ors [1993] Can LII 1745 ***(refd)***

Jones v. Lock [1865] 1 Ch App 25 ***(refd)***

Kishabai v. Jaikishan [1981] 1 LNS 36 ***(refd)***

Paragon Finance plc v. DB Thakerar & Co [1999] 1 All ER 400 ***(refd)***

Re Kathiravelu, Deceased; Sundari v. Pemungut Duti Harta Pesaka Tanah Melayu [1973] 1 LNS 131 HC ***(refd)***

Re Man Mihat, Decd [1965] 1 LNS 211 ***(refd)***

Legislation referred to:

Civil Law Act 1956, s. 23(1), (2), (3), (4)

Insurance Act 1996, s. 166(1), (3)

Limitation Act 1953, ss. 6(1)(a), 22(1)(b)

Married Women's Property Act 1870 [UK], s. 10

Other source(s) referred to:

JG Riddall, *The Law of Trusts*, 3rd edn, p 35

Snell's Equity, 26th edn, p 201

For the appellants - Robert Lazar (Ho Kee Tong & Razlan Hadri Zulkifli with him); M/s Gan, Ho & Razlan Hadri

For the respondent - Murali Achan; M/s K Kulasekar, Achan & Assoc

[Appeal from Court of Appeal, Civil Appeal No: W-02-815-2004]

[Editor's note: For the Court of Appeal judgment, please see Anthony Kulanthai Marie Joseph v. Malaysian Assurance Alliance Bhd [2008] 4 CLJ 205.]

Reported by Amutha Suppayah

JUDGMENT

Arifin Zakaria CJ (Malaya):

Introduction

[1] This is a claim by the respondent as Administratix of the Estate of Martin Raj a/l Anthony Selvaraj ('deceased'). The claim arose out of a policy of insurance taken out by the deceased on his own life for the benefit of his wife, the respondent to this appeal. The High Court dismissed the claim. The respondent succeeded in her appeal to the Court of Appeal. Leave to appeal was subsequently granted to the appellant on the following three questions:

(i) Whether a policy of life insurance effected by a man (insured) on his own life and expressed to be for the benefit of his wife, pursuant to s. 23(1) of the Civil Law Act 1956 will upon the death of the insured constitute the issuer of the policy (insurer) as a bare trustee from the date of death of the insured, and therefore any action brought by the beneficiary against the insurer to recover the proceeds of the insurance policy will fall within the provisions of s. 22(1)(b) of the Limitation Act 1953.

(ii) Whether a declaration by an Insurer in a policy of life insurance effected pursuant to s. 23(1) of the Civil Law Act 1956 that they will pay the proceeds of the policy upon the death of the insured will amount to the insurer being constituted as an express trustee or in the alternative a constructive trustee over the proceeds of the policy.

(iii) Whether a claim by the beneficiary on the policy containing a declaration by the insurer that they will pay the proceeds of the policy upon the death of the insured, will constitute a claim on a contract, and that in the circumstances as found, such a claim is barred by limitation pursuant to s. 6(1)(a) of the Limitation Act 1953 (Act 254).

A **The Facts**

[2] The facts are not in dispute, they are briefly as follows: On 12 June 1992 the deceased took out a policy of life insurance with the appellant. The policy was for the benefit of his wife, the
B respondent in this appeal. He passed away on 2 March 1993 leaving behind the respondent. A claim under the policy was then made by the respondent against the appellant, this was rejected by the appellant. It was not until 16 July 2004 that this claim was filed by the respondent, this is more than 11 years after the death of the
C deceased. The appellant resisted the claim on two grounds, namely:

(i) The claim was time barred by virtue of s. 6(1) the Limitation Act 1953 ('LA'); and

(ii) That the policy had lapsed.

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The High Court

[3] The High Court found in favour of the appellant and the claim was accordingly dismissed.

E **[4]** In his grounds of judgment (which is in the National Language) the learned trial judge stated that – "Polisi insuran yang dibuat oleh simati dengan defendan adalah merupakan satu jenis kontrak. Had masa untuk mengambil tindakan terhadap apa-apa kontrak ialah dalam masa enam tahun. Di dalam tindakan ini,
F tindakan plaintif dibuat lebih dari 11 tahun. Tidak ada apa-apa alasan diberi oleh plaintif mengapa kelewatan dilakukan untuk memulakan tindakan ini. Di atas alasan itu sahaja tindakan plaintif wajar di tolak."

G **[5]** The second ground for dismissing the claim was that the policy had lapsed.

The Court Of Appeal

[6] Before the Court of Appeal the appellant conceded on the
H issue of late payment of premium but maintained that the action was barred by limitation under s. 6(1)(a) of the LA as found by the learned trial judge.

[7] The Court of Appeal in a unanimous decision reversing the
I High Court Judge's findings held that:

(a) In the absence of the handing over of the trust property to an appointed trustee or trustees pursuant to s. 23 Civil Law Act 1956 ('CLA') or a legal representative, the trust property (the sum secured by the policy) remained in the hands of the appellant as bare trustee from the date of the death of the deceased;

(b) That the appellant having declared that it will pay the insurance money directly to the beneficiary, upon the demised of the deceased prior to the maturity date, the appellant must be declared to have been appointed as trustee consistent with s. 23(2) CLA; and

(c) That "It would be inequitable, unconscionable and a gross injustice to allow the appellant to extinguish the right of the *cestui que trust* of a s. 23 CLA policy of insurance by invoking the purported limitation, when none exist."

The Issues

[8] I am of the view that the answers to the issues posed to this court turn essentially on the effect to be given to s. 23 CLA, the relevant part of which reads:

> S. 23 (1) A policy of assurance affected by any man on his own life and expressed to be for the benefit of his wife or of his children or of his wife and children or any of them, or by any woman on her own life and expressed to be for the benefit of her husband or of her children or of her husband and children or any of them, shall create a trust in favour of the objects therein named, and the moneys payable under any such policy shall not so long as any object of the trust remains unperformed form part of the estate of the insured or be subject to his or her debts.
>
> (2) …
>
> (3) The insured may be the policy or by any memorandum under his or her hand appoint a trustee or trustees of the moneys payable under the policy, and from time to time appoint a new trustee or new trustees thereof, and may make provision for the appointment of a new trustee or new trustees thereof and for the investment of the moneys payable under any such policy.
>
> (4) In default of any such appointment of a trustee the policy immediately on its being effected shall vest in the insured and his or her legal personal representatives in trust for the purposes aforesaid.

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> (5) If at the time of the death of the insured or at any time afterwards there is no trustee, or it is expedient to appoint a new trustee or new trustees, a trustee or trustees or a new trustee or new trustees may be appointed by the High Court.

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> (6) The receipt of a trustee or trustees duly appointed, or in default of any such appointment or in default of notice to the insurance office the receipt of the legal personal representative of the insured, shall be a discharge to the office for the sum secured by the policy or for the value thereof in whole or in part.

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[9] Section 23 CLA had its origin in s. 10 of the English Married Women's Property Act 1870, now repealed. By sub-section (1) of s. 23 CLA a statutory trust is created in favour of the objects named in the policy and the moneys payable under the policy shall not so long as any object of the trust remained unperformed become part of the estate of the insured or be subject to the debt of the insured. To achieve this purpose the insured may under sub-section (3) appoint a trustee or trustees in respect of the moneys payable. And sub-section (4) provides that in default of such appointment the policy shall immediately vest in the insured and his or her personal representatives in trust for the purpose stated earlier. It is clear that the purpose of these provisions is to protect the interests of the spouse and children of the insured in the moneys payable under the policy against claim by any creditor of the insured.

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[10] The above view was confirmed by Suffian J (as he then was) in *Re Man Mihat, Decd.* [1965] 1 LNS 211; [1965] 1 LNS 211, where he held that by virtue of s. 23 Civil Law Ordinance (which is similar to s. 23 CLA) as the policy of assurance was effected by the assured on his own life and expressed to be for the benefit of his wife, the moneys payable under the policy did not form part of the estate of the deceased. Similar view was expressed by Abdul Hamid J (as he then was) in *Re Kathiravelu Deceased; Sundari v. Pemungut Duti Harta Pesaka Tanah Melayu* [1973] 1 LNS 131; [1972] 2 MLJ 165. In *Kishabai v. Jaikishan* [1981] 1 LNS 36 B.T.H. Lee J observed that:

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> Upon reading the section, it seems clear that the purpose of the section is to protect the interests of the widow and children of a deceased assured who has created a trust in their favour pursuant to its provisions. In other words, the legislature, viewing with sympathy any effort by a man to provide for his wife and family

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> after his death, has provided that a man may insure his life at any time for their benefit and any monies payable under the policy shall not go to pay his debts, but shall be held in trust for his family. And so far is this policy of protection carried that even when it is proved that the policy was effected and the premiums paid with intent to defraud the creditors of the insured, the fact will not defeat the trust, but the creditors will be entitled to receive out of the monies payable under the policy, only the sums actually paid by way of premiums – see *In re Yeo Hock Hoe's Policy* per Deane J at p. 34.

[11] In this case since the insured did not appoint any person as trustee under sub-section (3) of s. 23, therefore, under sub-section (4) the policy shall vest in the insured and upon his death in his legal personal representatives, ie, the respondent in this case. This creates a statutory trust in which the moneys payable under the policy is to be held in trust by the insured or on his death by his personal representatives as trustee for the named beneficiary. Therefore, the relationship of trust is one between the insured or his legal personal representatives and the beneficiary. However, in so far as the appellant is concerned it is merely the provider of the insurance policy under a contract of insurance between the appellant and the insured. Therefore, any obligation of the appellant under the policy is strictly contractual in nature. The ownership of the policy will pass to the personal representatives of the insured on his death, who steps into the shoes of the insured and takes over the right of the insured. The right of personal representatives, in the circumstances, is purely a right in contract and not a right under a trust.

[12] The Court of Appeal, however, held that the claim by the respondent herein, is a claim as *cestui que trust* and not founded on contract. The trust they said came to be created immediately upon the policy being effected by virtue of s. 23 CLA. Upon the death of the insured the sum insured became due and payable to the beneficiary and since the moneys had not paid to the beneficiary they held that the appellant is now holding the said sum as bare trustee. On that premise the Court of Appeal held that the claim by the respondent must succeed.

[13] Secondly, the Court of Appeal found that the appellant in this case was also appointed as trustee of the policy under s. 23(2) CLA by reason of the declaration made by the appellant as represented by the Chairman and the General Manager/Registrar of the appellant. This declaration reads:

A MALAYSIAN ASSURANCE ALLIANCE BERHAD will pay upon surrender of this Policy and subject to its provision,

(1) The Face Amount to the Owner if the Insured is the alive on the Maturity Date.

B (2) The Face Amount to the Beneficiary upon the death of the Insured prior to the "Maturity Date" provided that due proof of such death is furnished in form specified by the Company.

MALAYSIAN ASSURANCE ALLIANCE BERHAD has cause this Policy to be issued on the Issue Date.

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[14] The Court of Appeal held that the above undertaking is sufficient proof of the fact that the appellant was in fact appointed as trustee by the insured consistent with s. 23(2) CLA. As trustee the appellant, therefore, is liable to pay the insurance moneys to the D beneficiary upon the death of the insured.

[15] For the above reasons the Court of Appeal held that the claim is not a claim founded on contract but on trust, therefore, is not caught by s. 6 of the LA.

E **[16]** Taking the first point, I agree with the appellant's submission that there is nothing in s. 23 CLA purporting to appoint the appellant as trustee for the policy. Section 23(4) merely provides that in default of any appointment of a trustee or trustees by the insured then the insured or his or her legal personal representatives F will be the trustee of the policy. The fact that the policy is vested in the trustee for the benefit of the beneficiary does not mean that upon the death of the insured the money is automatically held on trust by the appellant for the benefit of the beneficiary as bare trustee. There is nothing in s. 23 or in the terms and conditions G of policy itself to support such a contention.

[17] This view is further supported by s. 166(1) and (3) of the Insurance Act 1996 (Act 553) which provides as follows:

H (1) A nomination by a policy owner … shall create a trust in favour of the nominee of the policy moneys payable upon the death of the policy owner, if -

(a) the nominee is his spouse or child; or

I (b) …

(2) …

(3) The policy owner ... may appoint trustees of the policy moneys and where there is no trustee - A

(a) the nominee who is competent to contract; or

(b) ... the Public Trustee

... shall be the trustee of the policy moneys and the receipt of a trustee shall be a discharge to the licensed insurer for all liability in respect of the policy moneys paid to the trustee. B

[18] Based on the provision in s. 166 of Act 553, it is clear that an insurer is not deemed a trustee of the policy moneys. In fact, C Act 553 provides that in default of a trustee being appointed, the nominee or a Public Trustee shall be appointed as trustee of the policy moneys. It is therefore my view that failure on the part of the appellant to pay the policy moneys over to the appointed trustee would amount to a breach of its contractual obligation to the D deceased or his nominee.

[19] I am also in agreement with the appellant that the relationship between the appellant and the insured, and on his death his personal representatives, is a contractual one and the E appellant is at no time the trustee of the moneys payable under the policy. Therefore, in the event the appellant acted in breach of the terms and conditions as spelt out in the policy, it is for the personal representatives to take the necessary legal action against the appellant, as the respondent had done in this present case. It F is important to bear in mind that whether any money is due and payable under the policy is subject always to the terms and conditions of the policy. The relationship between the insurer and the insured is purely a contractual relationship.

[20] On the question of bare trust my view is as follows: By G definition bare trust, is where the trustee under a trust has no obligation except to hand over the trust property to a person entitled to it. The appellant's contention is that as the claim by the respondent is time barred under the LA, therefore, no money is due H and payable to the respondent. It follows, therefore, that the appellant could not be said to be holding any money as bare trustee for the respondent. For these reasons I agree with the appellant that it is wholly erroneous on the part of the Court of Appeal to hold that the appellant is liable to the respondent for the moneys payable I under the policy as bare trustee.

[21] As for the declaration contained in the document forming part of the insurance policy attested to by the Chairman and General Manager/Registrar of the appellant, I am of the view that it could not be construed as an instrument appointing the appellant as the trustee of the policy. All it said was that the appellant undertakes to pay upon the surrender of the policy and subject to its provision, the face amount to the owner if he is still alive at the maturity date, or upon his death prior to the maturity date, to pay the face amount to the beneficiary. Again this is nothing more than a contractual undertaking under the policy and could not be construed, as was done by the Court of Appeal, to have the effect of making the appellant the trustee of the policy. To do so in my opinion would go against the well established principle of trust law that a person will not be regarded as having declared himself a trustee of property in the absence of words showing a clear intention to that effect. (See *Jones v. Lock* [1865] 1 Ch. App 25.)

Conclusion

[22] For the above reasons I would answer questions one and two in the negative and question three in the positive. In the result I would allow this appeal with cost and direct that the respondent bear the costs here and in the courts below. Deposit to be refunded to the appellant. My learned brother Zulkefli Ahmad Makinudin (FCJ) has seen this judgment in draft and has expressed his agreement with it. He has also proposed some addition to the draft, which I have incorporated in this judgment.

Mohd Ghazali Yusoff FCJ:

[23] On 13 May 2009 this court granted the applicant (the defendant in the originating action) leave to appeal against the decision of the Court of Appeal in Civil Appeal No. W-02-815-2004 on the following questions:

(a) Whether a policy of life insurance effected by a man (Insured) on his own life and expressed to be for the benefit of his wife, pursuant to section 23(1) of the Civil Law Act 1956 will upon the death of the Insured constitute the issuer of the policy (Insurer) as a bare trustee from the date of death of the Insured, and therefore any action brought by the beneficiary against the insurer to recover the proceeds of the insurance policy will fall within the provisions of Section 22(1)(b) of the Limitation Act 1953.

(b) Whether a declaration by an Insurer in a policy of life insurance effected pursuant to Section 23(1) of the Civil Law Act 1956 that they will pay the proceeds of the policy upon the death of the insured will amount to the insurer being constituted as an express trustee or in the alternative a constructive trustee over the proceeds of the policy.

(c) Whether a claim by the beneficiary on the policy containing a declaration by the insurer that they will pay the proceeds of the policy upon the death of the insured, will constitute a claim on a contract, and that in the circumstances as found in such a claim is barred by limitation pursuant to Section 6(1)(a) of the Limitation Act 1953.

The Background

[24] Martin Raj a/l Anthony Selvaraj (hereafter referred to as "the deceased") was the holder of a policy of life insurance (hereafter referred to as "the said policy") with Malaysian Assurance Alliance Berhad (the defendant in the originating action) issued on 12 June 1992 for the benefit of his wife, Anthony Kolanthai Marie Joseph which was effected pursuant to s. 23(1) of the Civil Law Act 1956 ("CLA"). Premiums were payable on the policy date and every one month thereafter during the lifetime of the insured as provided in the said policy.

[25] The deceased passed away on 2 March 1993 leaving behind the beneficiary, ie, Anthony Kolanthai Marie Joseph who is the legal administrator of the estate of the deceased by virtue of letters of administration dated 20 May 1998. Meanwhile, by letter dated 15 March 1993, the defendant informed the beneficiary that the said policy lapsed on 12 January 1993 "as the 1st year 8th monthly premium of RM166.53 has not been remitted to us" and as such "no claim can be admitted under the policy". The same was reiterated in another letter from the defendant dated 24 July 1995.

The High Court

[26] On 4 June 2003 the plaintiff (she was also the beneficiary), as administratrix of the estate of the deceased applied to the High Court by way of originating summons for the following declarations:

(a) that the said policy was valid as at 2 March 1993; and

(b) that the defendant is holding monies payable under the said policy in trust for the plaintiff,

and for an order that the defendant do pay all monies payable under the said policy to the plaintiff.

[27] The defendant contested the application on the grounds that the said policy had lapsed and that the action was time barred by virtue of s. 6(1)(a) of the Limitation Act 1953, *viz*., that an action founded on a contract shall not be brought after the expiration of six years from the date on which the cause of action accrued.

[28] The learned judge of the High Court held in favour of the defendant. He dismissed the plaintiff's case on both grounds canvassed by the defendant. The plaintiff appealed.

The Court Of Appeal

[29] Before the Court of Appeal, learned counsel for the defendant conceded that the said policy had not lapsed at the date of death of the insured, ie, the deceased. Thus, the only issue before the court was whether the plaintiff's action was time barred under the Limitation Act.

[30] In allowing the appeal, KN Segara JCA in delivering the judgment of the court said:

> There is no dispute that the policy of assurance M922849094 effected by Martin Raj a/l Anthony Selvaraj (insured) on his own life and expressed to be for the benefit of his wife Anthony Kolanthai Marie Joseph was a policy of assurance falling squarely under s. 23(1) CLA which created a statutory trust in favour of the wife *(cestui que trust)*.

[31] The relevant provisions of s. 23 of the CLA reads:

> (1) A policy of assurance effected by any man on his own life and expressed to be for the benefit of his wife ... shall create a trust in favour of the objects therein named, and the moneys payable under any such policy shall not so long as any object of the trust remains unperformed form part of the estate of the insured or be subject to his ... debts.
>
> (3) The insured may by the policy or any memorandum under his or her hand appoint a trustee or trustees of the moneys payable under the policy, and from time to time appoint a new trustee or new trustees thereof, and may make provision for the appointment of a new trustee or new trustees thereof and for the investment of the moneys payable under any such policy.

(4) In default of any such appointments of a trustee the policy immediately on its being effected shall vest in the insured and his or her legal personal representatives in trust for the purposes aforesaid.

[32] On the issue of limitation, N Segara JCA said:

The learned High Court Judge has seriously misdirected himself on the facts and the law when he held that the claim of the plaintiff was founded on contract, and was accordingly time barred when her originating summons, dated 4/6/2003, was filed in court more than 6 years after the date of death of her husband. The learned judge had his mind focused on section 6(1)(a) of LA 1953. He fell seriously in error in assuming the claim was an action founded on a contract.

He erred in failing to consider that the claim of the wife was, in fact and in law, a claim by her as a beneficiary (*cestui que* trust) of a policy effected under section 23(1) CLA creating a trust of the said policy of assurance immediately such a policy is effected.

[33] The court then went on to find that the trust property, ie, the sum secured by the said policy remained in the hands of the defendant as a bare trustee from the date of death of the insured. In relation to this, KN Segara JCA said:

In this case, upon the death of the insured, the trust property (the sum secured by the policy) was never at any time handed over by the defendant to a trustee or trustees duly appointed under the provisions of section 23 CLA or in default of such appointment, to the legal personal representative. In such circumstances, in law and in fact, the trust property (the sum secured by the policy) remained in the hands of the defendant as a bare trustee right from the date of death of the insured. On the particular facts of this case, any action to recover the sum secured by the policy in the hands of the defendant as bare trustee, by the cestui que trust and/or personal representative of the insured, is not an action founded on contract.

The factual matrix of this case can also be looked at from another perspective. The defendant, for all intents and purposes, had declared itself a trustee of the policy. This is patent from a document that formed part of the insurance policy documents. The document was signed by both, the Chairman, as well as the General Manager/Registrar of the defendant (page 77 Rekod Rayuan). The document contains the following declaration:

MALAYSIAN ASSURANCE ALLIANCE BERHAD will pay upon surrender of this policy and subject to its provision,

(1) The Face Amount to the Owner if the Insured is then alive on the Maturity Date.

A

> (2) The Face Amount to the Beneficiary upon the death of the Insured prior to the 'Maturity Date' provided that due proof of such death is furnished in the form specified by the Company.
>
> MALAYSIAN ASSURANCE ALLIANCE BERHAD has caused this Policy to be issued on the Issue Date.

B

This declaration was obviously made with the consent of the insured. It would appear that this very document is also evidence that the insured had appointed a trustee (that is, the defendant) consistent with section 23(3) CLA which reads:

C

> The insured may by the policy ... appoint a trustee ... of the moneys payable under the policy, ...

The insured, having accepted the defendant's declaration to pay the insurance moneys directly to the beneficiary, upon the death of the insured prior to the maturity date, the insured must be deemed unequivocally to have appointed the defendant as trustee. Such trustee would then be under an obligation to pay the insurance moneys (trust property) to the beneficiary upon the death of the insured. If the said trustee fails to do so, any action instituted by the beneficiary would not be a claim in contract but a claim by the beneficiary under the trust to recover from the trustee trust property, in the possession of the trustee. Under such circumstances, no period of limitation prescribed by the LA 1953 shall apply to the said action by the beneficiary, consonant with the provisions of section 22(1)(b) LA 1953 which reads:

D

E

F

> 22(1) No period of limitation prescribed by this Act shall apply to an action by a beneficiary under a trust, being an action -
>
> (a) ...; or
>
> (b) to recover from the trustee trust property or the proceeds thereof in the possession of the trustee, ...

G

The plaintiff, in her capacity as the legal personal representative of the insured, as well as the *cestui que* trust of the policy pursuant to the provisions of section 23 CLA, had no alternative but to file the originating summons seeking the declarations and orders set out therein. It would be inequitable, unconscionable and a gross injustice to allow the defendant to extinguish the right of the *cestui que* trust of a section 23 CLA policy of insurance, by invoking the purported limitation, when none exists.

H

I

[34] Premised upon the reasons above, the court allowed the appeal and granted the declarations and order sought by the plaintiff in the originating summons with costs and ordered that the deposit be refunded to the plaintiff. The court also ordered that the plaintiff shall be entitled to the costs in the court below.

The Federal Court

[35] Before this court, learned counsel for the defendant pointed out that the Court of Appeal found that this was not a claim on contract and hence the six years limitation period does not apply. He then said that it is not disputed that the plaintiff is a beneficiary and the defendant, a debtor but the defendant's change of stance before the Court of Appeal, *viz*., that the said policy had not lapsed at the date of the death of the deceased, does not affect the limitation period as the plaintiff's claim was a claim founded on contract.

[36] With due respect to the defendant's counsel, I do not think it is correct to say that the plaintiff is a beneficiary. The plaintiff is the administratrix of the estate of the deceased. It just so happens that she is also the beneficiary but she is not clearly suing as a beneficiary. Be that as it may, if I understand him correctly, what the defendant's counsel is saying is that notwithstanding the fact that the defendant had earlier intimated to the beneficiary, who actually represents the estate of the deceased, that the said policy had lapsed as the deceased failed to pay the premium on the due dates and subsequently having conceded at the Court of Appeal that the policy had not lapsed on the date of his death, the defendant need not pay the monies payable under the policy as the claim was statute barred. The defendant's counsel then argued that the purpose of s. 23 of the CLA is to protect the widow or beneficiaries but that the defendant was never a trustee.

[37] It is my view that the stand of the defendant is simply that because the action is a claim founded on contract and not on trust and hence time barred, the defendant need not pay the monies to the plaintiff. The consequence of this argument, if accepted by the court, would result in the monies, which is trust property, remaining in the coffers of the defendant and immediately becoming its property. I am of the view that this certainly does not speak well of the insurance industry if this is a common practice.

[38] In his submission, learned counsel for the plaintiff contended that s. 23 of the CLA creates a trust of the policy and hence the policy monies are trust property. He said that on the facts of the case the defendant is trustee of the monies. He then pointed out that under the said policy, the defendant by declaration undertook to pay direct to the beneficiary and this would denote that there was express appointment of the defendant as trustee.

[39] In his reply the defendant's counsel conceded that if there is trust, limitation does not apply. He then referred to the Canadian case of *Freemont Development Company Limited v. Travellers Indemnity Company & Ors* [1993] Can LII 1745 (BCSC). In that case, "the parties have concurred on a Special Case for adjudication pursuant to r. 33 of the Rules of Court". The agreed facts, summarised by Gill J in her judgment, read as follows:

> In May, 1978, the plaintiff commenced action against Mr Sigesmund, a solicitor, for damages resulting from his professional negligence and/or breach of fiduciary duty occurring between 1971 and 1977. In January, 1993 the plaintiff obtained judgment in the amount of $496,985.58. In an attempt to execute upon the judgment, a Writ of Seizure and Sale was issued. It was returned *nulla bona*. The plaintiff has no means of satisfying its judgment against Mr Sigesmund.
>
> From January, 1971, to October, 1978, Mr. Sigesmund was a member of the Law Society of British Columbia. The various insurers named as defendants insured the Law Society and its members against professional liability for the years 1977 through 1983.

One of the two questions posed for adjudication reads:

> 2. Does the plaintiff have a direct cause of action against the defendant insurers as a beneficiary under the policies of insurance?

In her judgment, Gill J said:

> In considering whether a trust has been created, the question can be posed in various ways. Has the promisee become a trustee of the benefit of the contract for the third party or have the parties manifested an intention to create an equivalent interest. In my view, the fact that policies of liability insurance such as the present necessarily involve potential benefit to third parties is not sufficient to entitle the plaintiff to assert a beneficial right as *cestui que* trust to enforce the contract. The second question is therefore also answered in the negative.

[40] I am of the view that the case of *Freemont Development*, which is of course not binding on this court, has no bearing at all in this instant appeal. The facts of that case are clearly distinguishable from that of this instant appeal. The defendants in *Freemont Development* were various insurance companies which insured the Law Society of which Mr Sigesmund was a member at the relevant time. Gill J was of the view that the plaintiff does not have a direct cause of action against the insurers. In the instant appeal, the plaintiff is the administratrix of the estate of the deceased. She has a direct cause of action against the defendant, ie, the insurers on behalf of the estate of the deceased.

[41] In the instant appeal, the defendant approached the case as one of contract and thereupon relied on s. 6 of the Limitation Act as barring the claim. This argument cannot hold water in the face of s. 23 of the CLA. I entirely agree with the judgment of the Court of Appeal. I am equally of the view that this is a case of a statutory trust as between the deceased and the plaintiff as administratrix. It is settled law that s. 23 of the CLA creates a trust in favour of the named beneficiary. Even an assignee of the policy must take subject to the trust.

[42] In *Re Man Mihat, Decd* [1965] 1 LNS 211; [1965] 2 MLJ 1, the facts showed that the assured had taken out an insurance policy on his life and by the terms of the policy the insurance company agreed to pay that sum at the end of twenty five years from the commencement of assurance or the previous death of the assured to the assured or to his assigns if he be living at the maturity of the policy or in the event of his death to the beneficiary named in the policy. The assured named his widow as the beneficiary. On the death of the assured his widow took out letters of administration to his estate. The question then arose whether the monies payable under the policy belonged to her beneficially or formed part of her husband's estate, to be distributed among his heirs. It was held, *inter alia*, that by virtue of s. 23 of the Civil Law Ordinance as the policy was effected by the assured on his own life and expressed to be for the benefit of his wife, the monies payable under the policy did not form part of the estate of the deceased. In his judgment Suffian J (as he then was) said (at pp. 2-3):

> Therefore I am of the opinion that here too **this policy would have created a trust in favour of the wife** if a non-Muslim and immediately on its being effected it vested, as provided for by sub-section (4) of section 23, in the insured or his legal personal representative for the purposes of the trust.

> I am further of the opinion that the subsequent assignment has made no difference because *even if the policy had been assigned to a third person (here it was assigned to the wife herself) that person could only receive the policy money subject to the statutory trust in favour of the wife, In re Fleetwood's Policy* [1926] Ch 48. ... Similarly here too even if the policy had been assigned by the husband to a third person, not the wife, *because the statutory trust created by the policy in favour of the wife still remains unperformed the trust cannot be defeated and the policy money cannot form part of the husband's estate.* (emphasis added)

[43] In *Re Kathiravelu, Deceased; Sundari v. Pemungut Duti Harta Pesaka Tanah Melayu* [1973] 1 LNS 131; [1973] 2 MLJ 165 HC the facts were these. The deceased had taken out policies of assurance with two insurance companies for the benefit of his wife. The question which arose was whether estate duty was leviable on the monies received or receivable under the policies of insurance. Abdul Hamid J (as he then was) held, *inter alia*, that the policies were effected for the benefit of the wife and came within s. 23 of the CLA; he said (at p. 167):

> Assuming for a moment that the policies under consideration were policies properly effected under and came within section 23 of the Civil Law Act, then, clearly, trusts are created for the benefit of the wife. *No special appointment of a trustee has to be made because under subsection (4), such policy shall in default of an appointment vest in the insured and his or her personal representatives in trust for the* benefit of the wife. (emphasis added)

[44] In the instant appeal, the following endorsement was attached to the said life policy, namely:

> 1. Beneficiary Nomination Under Section 23 Civil Law Act
>
> This endorsement is deemed to be valid only if duly signed by the Registrar of the Company with the Company's stamp duty affixed.
>
> This endorsement is only applicable if the beneficiary/beneficiaries is/are the spouse and children.
>
> a. This Policy is effected under 'Section 23 of the Civil Law Ordinance of the Federation of Malaya' for the benefit of the beneficiary/beneficiaries as stated in the Application Form.
>
> The Insured hereby appoints himself or herself the Trustees as stated in the 'Appointment of Trustees' Form to be Trustees of all moneys payable hereunder.

b. It is hereby agreed that the provisions of this Policy under 'Ownership Provisions' be cancelled in its entirety and shall be substituted by the following:

> All rights, privileges and options under this contract shall be reserved to the Trustees alone.

The beneficiary as stated in the application form to the said policy is Anthony Kulanthai Marie Joseph, the deceased's wife. The facts clearly showed that when the deceased took out the said policy, it was his intention that the beneficiary, ie, his wife should receive the monies payable under the policy in the event of his death prior to the date of maturity of the policy. What is also clear is that under s. 23 of the CLA and supported by the authorities referred to earlier, the sum payable under the said policy should be paid to the beneficiary for her own benefit and this sum does not form part of the estate of the deceased. Thus, the said policy created a trust in favour of the beneficiary. It is a statutory trust. As long as it remains unperformed, the trust cannot be defeated (see *Re Man Mihat, Decd*).

[45] The defendant never handed the trust property, ie, the monies or the sum secured by the said policy. The defendant is required pursuant to s. 23 of the CLA to hand over the monies to the legal personal representative in default of an appointment of a trustee but up to date the monies remained in its hands. The plaintiff as administratrix is claiming under the trust the trust property which is now in the possession of the defendant with knowledge that it is trust property. Is the defendant then entitled to assert title over monies which it knows is trust property? I think not. Where a person is in possession of trust property which he knows does not belong to him, the law regards him as a constructive trustee. A constructive trust is simply a relationship created by equity in the interest of conscience. According to *Snell's Equity* (26th edn) (at p. 201), a constructive trust is 'a trust which is imposed by equity in order to satisfy the demands of justice and good conscience, without reference to any express or presumed intention of the parties'. In *The Law of Trusts* by JG Riddall (3rd edn) (at p. 359) it is illustrated as follows:

> The constructive trust is a remedial device that is employed to correct unjust enrichment. It has the effect of taking title to property from one person whose title unjustly enriches him, and transferring it to another who has been unjustly deprived of it ...

In *Paragon Finance plc v. DB Thakerar & Co* [1999] 1 All ER 400, Millett LJ explained the concept of a constructive trust at p 409 as follows:

> A constructive trust arises by operation of law whenever the circumstances are such that it would be unconscionable for the owner of property (usually but not necessarily the legal estate) to assert his own beneficial interest in the property and deny the beneficial interest of another. In the first class of case, however, the constructive trustee really is a trustee. He does not receive the trust property in his own right but by a transaction by which both parties intend to create a trust from the outset and which is not impugned by the plaintiff. His possession of the property is coloured from the first by the trust and confidence by means of which he obtained it, and his subsequent appropriation of the property to his own use is a breach of that trust.

[46] Under s. 22(1)(b) of the Limitation Act no period of limitation prescribed under the same shall apply to a beneficiary under the trust in an action to recover trust property in the possession of a trustee. The defendant under the circumstance of the instant appeal is a constructive trustee of the trust property. To accede to the defendant's submission would tantamount to this court sanctioning a breach of trust.

[47] The first question posed is whether the defendant as insurer is a bare trustee from the date of death of the insured, and therefore any action brought by the beneficiary to recover the proceeds of the said policy would fall within the provisions of s. 22(1)(b) of the Limitation Act. I find it unnecessary to answer the first question posed by the defendant as the answer to the second question will finally dispose of this appeal. I must impress here that it is the administratrix of the estate of the deceased that brought this action and not the beneficiary. To put it simply, this is a claim by the estate and not the beneficiary.

[48] The second question posed is whether the declaration by the defendant as insurer for the said policy effected pursuant to s. 23(1) of the CLA that it will pay the proceeds of the policy upon the death of the insured will amount to the defendant as insurer being constituted as an express trustee or in the alternative a constructive trustee over the proceeds of the policy. I would answer this question in this way. In my judgment the defendant is a constructive trustee of the monies in question. The defendant declared in the said policy that it will pay the "Face Amount", ie, the monies to the

beneficiary upon the death of the insured prior to the "Maturity Date". Thus, following *Re Kathiravelu, Deceased; Sundari supra*, a trust was created for the benefit of the beneficiary. No special appointment of a trustee has to be made because under s. 23(4) of the CLA, such policy shall in default of an appointment vest in the insured and his personal representative in trust for the benefit of the beneficiary. It is manifestly unconscionable for the defendant to retain in its hands monies which it is fully aware is trust property. And, as I have already said, the defendant in these circumstances is a constructive trustee of the monies.

[49] The third question posed is answered in the negative. The Court of Appeal made a correct finding that this was not a claim founded on contract.

[50] I would conclude as follows. The relationship between the insured and the insurer may well have been one founded on contract during the former's lifetime. However, upon his death, the monies in the hands of the insurer, ie, the defendant became impressed with a trust. That trust was a statutory trust as between the personal representative of the deceased's estate and the ultimate beneficiary. However, *vis-a-vis* the insurer and the ultimate beneficiary, the insurer's express knowledge that the monies in its hand were trust monies rendered it a constructive trustee. The claim in the present instance is proprietary in nature and not based on mere contract. The relevant limitation period is not that prescribed in s. 6(1)(a) of the Limitation Act.

[51] For the reasons aforesaid I would dismiss this appeal with costs and order that the deposit be remitted to the plaintiff, ie, the respondent to account of costs.